Court of Appeals
Seventh District of Texas
Amarillo

No. 07-18-00374-CR
No. 07-18-00375-CR

Darren Lamont Biggers,
Appellant

v.

The State of Texas,
Appellee

Appeal from the 235th District Court, Cooke County, Texas,
The Honorable Jim Hogan, visiting judge, presiding.

Trial Court Cause No. CR17-00072 & CR17-00073

Brief for the State

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Oral argument not requested

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I. The evidence is legally sufficient to show that the codeine/promethazine mixture was a penalty group 4 controlled substance.

II. There is sufficient evidence to corroborate Appellant's extrajudicial confession that he ate the methamphetamine when he saw law enforcement.

Statement of the Facts

The State is satisfied with Appellant's rendition of the facts.

Summary of the Argument

First, a rational jury could find beyond a reasonable doubt that the codeine had a concentration of not more than 200 milligrams per 100 milliliters because the jury was permitted to make reasonable inferences from the evidence, and a reasonable deduction from the evidence was that the codeine was in the required proportion. Because, (1) the substance contained codeine and promethazine, (2) the substance was prescription cough syrup, and (3) prescription cough syrups of this type are typically penalty group 4 controlled substances because they have the required proportion of codeine—less than 200 milligrams per 100 milliliters.

Second, a rational jury could find beyond a reasonable doubt the promethazine in the substance had its own valuable medicinal

qualities. The evidence showed that promethazine is an antihistamine, and that it is a non-narcotic, active medicinal substance that was prevalent in the compound.

Finally, the evidence sufficiently corroborated Appellant's extrajudicial confession that he ate the methamphetamine. The evidence showed that Appellant showed up to a drug deal at the allotted time and place, that he was identified as the supplier, that people frequently eat methamphetamine to avoid it being found, and that the methamphetamine was not found in the car.

Argument and Analysis

In evaluating the legal sufficiency of evidence, the Court must consider the evidence in the light most favorable to the jury's verdict and determine whether a rational jury could have found Appellant guilty of all of the elements of the offense beyond a reasonable doubt. *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003). The trier of fact is the sole judge of the credibility and weight of the evidence, and the Court will not reevaluate weight and credibility of evidence. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). This Court must presume that the factfinder resolved any conflicting

inferences in favor of the verdict. *Id.* The jury is permitted to make reasonable inferences from evidence. *Hutchinson v. State*, 424 S.W.3d 164, 170 (Tex. App.—Texarkana 2014, no pet.) *citing Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Evidence is legally sufficient when, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *Miles v. State*, 357 S.W.3d 629, 631 (Tex. Crim. App. 2011).

I. The evidence is legally sufficient to find that the codeine/promethazine mixture was a penalty group 4 controlled substance.

a. The evidence is legally sufficient to support a jury finding that the codeine concentration is not more than 200 milligrams of codeine per 100 milliliters.

Testimony from a chemist that establishes that a substance contains codeine and promethazine and that that mixture is typically found in cough syrups that have a codeine concentration of less than 200 milligrams of codeine per 100 milliliters is legally sufficient to prove that a substance is a Penalty Group 4 drug. *Dudley v. State*, 58 S.W.3d 296, 299–300 (Tex. App.—Beaumont 2001, no pet.).

At the outset, the State is not required to prove the concentration of a substance, even in the context of codeine and promethazine as found in this charge. Instead, the State is only required to prove that the aggregate of the controlled substance, including adulterants and dilutants, equals the minimum weight for the offense charged. *Melton v. State*, 120 S.W.3d 339, 344 (Tex. Crim. App. 2003).

In *Sanchez II* there was no quantification of codeine. Nevertheless, the appellate court, on remand from the Court of Criminal Appeals, found that the testimony established that (1) the substance contained codeine, (2) the substance appeared to be cough syrup, and (3) "usually" cough syrups have a concentration of codeine not more than 200 milligrams per 100 milliliters. *Sanchez v. State*, No. 01-06-00210-CR, 2010 Tex. App. LEXIS 4857, *23 (Tex. App.—Houston [1st Dist.] June 24, 2010, no pet.) (not designated for publication) (*Sanchez II*). Under these facts, the Court held that the evidence was legally sufficient to support the finding that the compound contained codeine in sufficient proportion. *Id.* at *25.

Additionally, in *Dudley*, there was no quantification of codeine. The testimony established that the substance in question contained

both codeine and promethazine. *Dudley*, 58 S.W.3d at 299. Further, the chemist testified that codeine and promethazine is "a combination commonly found in cough syrup type preparations that contain a codeine concentration of less than 200 milligrams per 100 milliliters of syrup." *Id.* Under these facts, the appellate court held that the evidence was legally sufficient to establish proof of the requisite codeine concentration. *Id.* at 300.

Similar to *Sanchez II* and *Dudley*, the evidence in this case shows that the substance in this case contains codeine in a concentration of less than 200 milligrams per 100 milliliters of syrup. First, like in both *Sanchez II* and *Dudley*, the chemist's testimony was uncontroverted that the substance contained both codeine and promethazine. (IV R.R. 121, 132). She testified that the substance smelled like cough syrup. (IV R.R. 134). Further, like the chemists in *Sanchez II* and *Dudley*, she testified that codeine and promethazine are typically combined in prescription cough syrups and that in those cough syrups the concentration of codeine is typically less than 200 milligrams per 100 milliliters. (IV R.R. 132–34). Defendant also admitted the substance was prescription cough syrup, and he even claimed to have a

prescription for it that never materialized. (IV R.R. 80). Defendant also admitted in a jail call that he was caught with "codeine in the car . . . that drink stuff . . ." (*State's Exhibit* 12-1, 1:40–2:15).

When reviewing the facts of this case in a light most favorable to the prosecution and giving deference the jury's determination of the facts, a rational jury could find beyond a reasonable doubt that the codeine was in the sufficient proportion. The jury was permitted, in accordance with *Sanchez I* and *Dudley*, to make the reasonable inference that the codeine was in sufficient proportion. Similar to *Sanchez II* and *Dudley*, the jury could reasonably deduce that (1) this substance was prescription cough syrup that contained both codeine and promethazine; (2) prescription cough syrup contains codeine in a proportion of not more than 200 milligrams per 100 milliliters; and thus (3) the substance in the case was a penalty group 4 controlled substance as alleged in the indictment.

b. The evidence is legally sufficient to prove that promethazine confers on the substance valuable medicinal qualities.

Second, the State has provided evidence that a rational jury could find that the promethazine found in the mixture was in sufficient

proportion to confer on the substance valuable medicinal qualities. In *Sanchez I*, the evidence showed (1) that promethazine, "on its own has a valuable medicinal quality" as a nonnarcotic active ingredient usually found in cough syrups and (2) that the thick, purple substance had a "mediciney" smell. *Sanchez v. State*, 275 S.W.3d 901, 904–905 (Tex. Crim. App. 2009) (*Sanchez I).* The Court of Criminal Appeals found that a rationally jury could find that the promethazine was in sufficient proportion to confer on the substance valuable medicinal qualities. *Id.* at 905. Specifically, the Court found that the chemist's testimony stating that promethazine "on its own has a valuable medicinal quality" is sufficient to support a finding that it was "in sufficient proportion to confer on the substance valuable medicinal qualities." *Id.* at 905. Moreover, the Court rejected expressly rejected the claim that a quantification of promethazine in the substance is required. *Id.*

Like in *Sanchez I*, the evidence in this case showed that promethazine was an active ingredient that on its own had a valuable medicinal quality: the chemist testified that promethazine was a nonnarcotic active ingredient—an antihistamine—that has its own medicinal qualities. (IV R.R. 123, 135). She also testified that the

substance smelled like cough syrup. (IV R.R. 120, 132–34). Moreover, the chemist testified the promethazine was prevalent in the compound, and that it is not like food coloring or sugar—it actually does something medicinally valuable. (IV R.R. 132, 134). Similar to *Sanchez I*, the chemist clearly stated that promethazine on its own has a valuable medicinal quality of being an antihistamine, that it was prevalent in the mixture, and that it had a smell like cough syrup—which would support a finding by a jury that it was "in sufficient proportion to confer on the substance valuable medicinal qualities."

The Defendant argues that *Miles* is controlling. However, *Miles* is distinguishable from the case at hand. First, *Miles* primarily dealt with an indictment that was incorrect. *Miles*, 357 S.W.3d at 632. Essentially, the defendant was tried and convicted for possession of penalty group 1 codeine by way of the indictment and jury charge, but the State failed to prove that the promethazine did not have a valuable medicinal quality other than those possessed by the codeine alone. *Id.* at 637–38 (explaining that penalty group 1 codeine requires the negation of penalty group 4 codeine). The evidence only showed that promethazine is most often found with codeine, that it is an antihistamine, and that

the codeine and antihistamine work together. *Id.* at 638. Thus, because the evidence at trial merely showed that codeine was present in the mixture, a jury could not find that either it was or was not in sufficient proportion to confer on the compound valuable medicinal qualities. *Id.*

The Court in *Miles* pointed out that what is lacking in *Miles* is present in *Sanchez I* and the case at hand: testimony stating that "promethazine on its own has a valuable medicinal quality." Thus, like in *Sanchez I*, and unlike *Miles*, the evidence in this case is sufficient to prove that the Promethazine is sufficient to confer valuable medicinal qualities on the mixture.

II. There is ample independent evidence to establish the corpus deliciti for tampering with physical evidence.

Tampering with physical evidence requires three elements: "(1) knowing that an investigation or official proceeding is pending or in progress, (2) a person alters destroys, or conceals any record, document, or thing, (3) with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding." *Williams v. State*, 270 S.W.3d 140, 142 (Tex. Crim. App. 2008); TEX. PENAL CODE ANN. § 37.09(a)(1) (Lexis 2019).

Under the corpus delicti rule, an extrajudicial confession by a defendant is insufficient to sustain a conviction unless it is corroborated by independent evidence tending to show that the crime has been committed. *Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002). Evidence independent of the extrajudicial confession must show that the "essential nature" of the crime was committed. *Carrizales v. State*, 414 S.W.3d 737, 743 (Tex. Crim. App. 2013). The purpose of the rule is to ensure no person is convicted of a crime that never occurred, based solely on a false confession. *Miller v. State*, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015). "The other evidence need not be sufficient by itself to prove the offense: all that is required is that there be some evidence which renders the commission of the offense more probable than it would be without the evidence." *Rocha v. State*, 16 S.W.3d 1, 4 (Tex. Crim. App. 2000). The State may prove the corpus delicti by circumstantial evidence. *See Mcduff v. State*, 939 S.W.2d 607, 623–24 (Tex. Crim. App. 1997).

Essentially, the evidence tends to show that Appellant showed up to a methamphetamine deal after brokering the deal with an informant who was working at the direction of the police, that there was no

methamphetamine in the vehicle when the police searched it, and that defendants are known to eat methamphetamine. (*State's Exhibit* 2; IV R.R. 32–35).

The informant visually identified Appellant as the person who he had ordered the methamphetamine from. (IV R.R. 35). The evidence showed that Appellant was going to deliver approximately half a gram of methamphetamine to Dollar General for fifty dollars. (*State's Exhibit* 2; IV R.R. 32–35). As police were approaching, one of the deputies noticed a lot of movement coming from the passenger side of the vehicle where Appellant was sitting. (IV R.R. 89). People frequently keep small amounts of methamphetamine in their hands or in immediate reach so that it can be disposed of or eaten quickly. (IV R.R. 95). The movement the deputy noticed was enough movement that Appellant could have briskly thrown a baggy of meth into his mouth and swallowed it. (IV R.R. 89).

Multiple members of law enforcement testified that ingesting methamphetamine is one of the primary ways in which a person can attempt to keep evidence from being found during an investigation. (IV R.R. 39–40, 87–88, 171). Further, evidence showed that if it is a smaller

amount of methamphetamine, such as half a gram or a gram, it is likely to be ingested. (IV R.R. 88). After a search of the vehicle, no methamphetamine was found. (IV R.R. 87).

Appellant explained on a jail call how he was going to "kill two birds with one stone." (*State's Exhibit* 12-2, 5:10–5:40; IV R.R. 172). A $100 bill was found in the vehicle. (IV R.R. 79). Essentially, the driver of the vehicle in which Appellant was a passenger had a $100 bill and wanted fifty dollars' worth of methamphetamine; the informant had just set up a deal to buy fifty dollars' worth of methamphetamine from Appellant; so, the methamphetamine was going to be sold to the two customers and the driver was going to be able to get his fifty dollars' worth of change once the deal was consummated. (IV R.R. 172).

The informant in the case testified that he ordered methamphetamine from Appellant that day because he knew Appellant was a drug dealer, and he knew Appellant had sold methamphetamine to the mother of his child. (V R.R. 39).

In the present case, Appellant was charged with tampering with evidence by eating the evidence. Considering all of the evidence outside of Appellant's confession that he ate the methamphetamine, the

evidence tends to establish that the crime of tampering with evidence occurred. *See Rocha*, 16 S.W.3d at 4 (finding that independent evidence need only be some evidence that renders commission of the offense more probable than it would be without the evidence). Simply put: (1) Appellant showed up to a drug deal at the exact time and place of the drug deal; (2) Appellant was identified as the methamphetamine supplier by the informant immediately prior to being detained by law enforcement; (3) Appellant was moving an excessive amount when law enforcement first viewed the vehicle; (4) Appellant explained how he was going to make change with money that was in the car after the drug deal was completed; and (5) people frequently ingest methamphetamine as a means to prevent it from failing into the hands of law enforcement and no methamphetamine was found in the vehicle.

Conclusion

First, a rational jury could find that the substance contained a concentration of less than 200 milligrams of codeine per 100 milliliters: The chemist testified that (1) the substance contained codeine and promethazine, (2) it smelled like cough syrup, (3) codeine and promethazine are combined in cough syrups, and (4) cough syrups

typically have a codeine concentration of less than 200 milligrams of codeine per 100 milliliters.

Second, a rational jury could find that promethazine was present in sufficient proportion to confer on the substance valuable medicinal qualities: The chemist testified that (1) promethazine is an antihistamine that has its own valuable medicinal qualities, (2) the substance smelled like cough syrup, and (3) promethazine was prevalent in the mixture.

Finally, independent evidence corroborates Appellant's extrajudicial confession on a jail call that he had eaten the methamphetamine when he saw law enforcement. The evidence showed (1) that a drug deal was scheduled to take place; (2) that Appellant showed up to the drug deal and was identified as the methamphetamine supplier; (3) that Appellant was moving a lot when first observed; (4) that no drugs were found in the vehicle; and (5) that people frequently eat small amounts of methamphetamine to avoid it being discovered.

Prayer

The State humbly requests that this Court affirm the judgment of the trial court below.

Respectfully submitted,

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